

Dated: May 15, 1998

CASE NO.: 98-CER-1/2/3

IN THE MATTER OF:

**Douglas A. Frey**  
Complainant

v.

**United States Coast Guard Academy**  
Respondent

**RECOMMENDED DECISION AND ORDER  
APPROVING SETTLEMENT AGREEMENT  
and  
DISMISSING COMPLAINT WITH PREJUDICE**

This is a proceeding arising under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9610; the Federal Water Pollution Control Act or Clean Water Act (FWPCA), 33 U.S.C. §1367; the Toxic Substances Control Act (TSC), 15 U.S.C. §2622; and the Solid Waste Disposal Act or Resource, Conservation and Recovery Act (SWDA), 42 U.S.C. §6971 (collectively referred to as the whistleblower statutes) and their implementing regulations found at 29 C.F.R. Part 24. The undersigned is in receipt of a Settlement Agreement, with Attorney Fee Petition attached, and a Joint Letter Regarding Confidentiality.<sup>1</sup> This Judge pauses to note that neither the CERCLA, the SWDA nor the FWPCA contains the “entered into” language that imposes a responsibility of review of a settlement on the Secretary. I hasten to add, however, that the TSC does require that the parties must submit the settlement for review.

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<sup>1</sup>The parties appeared for the first day of hearing of this matter and informed this Judge of their intention to amicably resolve the matter. Although the parties have only identified claim numbers 98-CER-1 and 2 on the Settlement Agreement, it is clear from the statements made on the transcript that the parties intend to encompass the settlement of all three pending claim numbers with the submission of this Settlement Agreement. The transcript will be forwarded to the Administrative Review Board for inclusion with the administrative file of this matter upon its receipt from the reporting firm.

Complainant has included the TSC as one of the statutes pursuant to which he has brought his pending claims. Accordingly, this Judge undertakes a review of the parties' Settlement Agreement.

The Part 24 regulations do not contain any provision relating to a dismissal of a complaint by voluntary settlement. Therefore, it is necessary to refer to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18, which Rules are controlling in the absence of a specific provision at Part 24.

Part 18.9 allows the parties in a proceeding before an administrative law judge to reach agreement on their own. 29 C.F.R. Part 18.9(a)-(c). The parties must "[n]otify the administrative law judge that the parties have reached a full settlement and have agreed to dismissal of the action." 29 C.F.R. Part 18.9(c)(2). Once such notification occurs, the administrative law judge shall then issue a decision within thirty (30) days if satisfied with the agreement's form and substance. 29 C.F.R. Part 18.9(d).

This Judge must review the Settlement Agreement to determine whether its terms are a fair, adequate and reasonable settlement of the complaint. **See McDowell v. Doyon Drilling Services, Ltd.**, 96-TSC-8 (ARB 5/19/97) (Citation Omitted). **See Also Bonanno v. Stone & Webster Engineering Corp.**, 97-ERA-33 (6/27/97) (Citation Omitted) (decided pursuant to an analogous whistleblower statute, the Energy Reorganization Act). In the matter **sub judice**, I note that the terms of the settlement agreement encompass the settlement of matters arising under various laws. **See Settlement Agreement**, para. 1(c). For the reasons set forth in **Poulos v. Ambassador Fuel Oil Co., Inc.**, 86-CAA-1 (Sec'y 11/2/87), I have limited my review of the agreement to determining whether its terms are a fair, adequate and reasonable settlement of Complainant's allegation that Respondent violated the whistleblower statutes identified in his various complaints.

Upon careful review, this Judge has reached the determination that the Settlement Agreement fully comports with precedent established by the Secretary and/or Administrative Review Board.

The parties have included language in the agreement to the effect that Respondent believes it acted lawfully and that nothing in the agreement should be construed as an admission of liability or violation of the whistleblower statutes. **See Settlement Agreement**, para. 6. This recommended decision and order shall not be construed as indicating my view on the merits of this entire matter.

In accordance with **Biddy v. Pipeline Service Co.**, 95-TSC-7 (12/3/96), the parties have certified that no other settlement agreements were entered into between the parties. **See Settlement Agreement**, para. 9.

The parties have also submitted a Joint Letter Regarding Confidentiality, requesting that the Settlement Agreement be designated as confidential commercial information within the meaning and intent of the Freedom of Information Act (FOIA). 5 U.S.C. §552; 29 C.F.R. Part 70.26. FOIA requires agencies to disclose requested documents unless they are exempt from disclosure. **See Bonanno, supra**, at p. 2.; **Klock v. Tennessee Valley Auth.**, 95-ERA-20 (ARB 5/30/96), at p. 2;

**Darr v. Precise Hard Chrome**, 95-CAA-6 (Sec’y 5/9/95), at p. 2; **Webb v. Consolidated Edison Co.**, 93-CAA-5 (Sec’y 11/3/93), at p. 2. Since no FOIA request has been made, “it would be premature to determine whether any of the exemptions in FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. It would also be inappropriate to decide such questions in this proceeding.” **Darr, supra**, at pp. 2-3. **See Also DeBose v. Carolina Power and Light Co.**, 92-ERA-14 (Sec’y 2/7/94), at p. 3. Nevertheless, the Settlement Agreement and its accompanying documents shall be placed in a portion of the file clearly designated as confidential commercial information which must be handled in accordance with the appropriate procedure for a FOIA request, which procedure is found at 29 C.F.R. Part 70.26. **See Generally Bonanno, supra**, at n. 1.

Accordingly, it is hereby **RECOMMENDED** that the Settlement Agreement between Complainant Frey and Respondent United States Coast Guard Academy be **APPROVED** and that the matter be **DISMISSED WITH PREJUDICE**. It is **FURTHER RECOMMENDED** that the Settlement Agreement be designated as confidential commercial information, to be handled in accordance with 29 C.F.R. Part 70.26.

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**DAVID W. DI NARDI**  
**Administrative Law Judge**

Boston, Massachusetts  
DWD:jw

**NOTICE:** This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).